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No.: 88-1985

IN THE
# Supreme Court of the United States
**October Term, 1988**

MARGARET HUDSON,

*Petitioner,*

-against-

NATIONAL RAILROAD
PASSENGER CORPORATION,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE C. SABLE
450 Seventh Avenue
New York, NY 10123
(212) 244-2740

L. KEVIN SHERIDAN
1045 Oyster Bay Road
P.O. Box 69
East Norwich, NY 11732
(516) 922-8030
*Counsel of Record*

*Counsel for Petitioner*

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1. REVIEWABILITY

The short answer to Amtrak's argument that petitioner did not sufficiently preserve for review the issues presented by her petition (Br., 19-21) is that, not only were these issues preserved, but they were reviewed on the merits by the Court of Appeals and this Court has at least the same power and authority to review

these issues as did that court. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 (1981). In addition, in making this argument, which even Amtrak concedes does not constitute any absolute bar to review (Br., 21), Amtrak ignores the record made by trial counsel in attempting to obtain a proper charge in this case (see, e.g., JA 55-56 [counsel granted an "exception" on issue of alleged "supersusceptibility" to injury by reason of sexual harassment]; JA 36-37 [express refusal of Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), instruction on causation]; JA 58-59 [no need to repeat previously denied requests]). Compare Biundo v. Old Equity Life Ins. Co., 662 F.2d 1297, 1300 (9th Cir. 1981) (following "functional approach" to Rule 51); cf. Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir.

1956) (reviewing both excepted to and unexcepted to errors). Likewise, Amtrak ignores that in fact the court's charge was overwhelmingly extemporaneous, with the court radically departing from what it had earlier informed counsel it would be charging this jury. See Petition, 20-22. Compare Troupe, 234 F.2d at 260-61 (Frank, J., concurring) (noting difficulty faced by counsel who does not have written copy of charge); see also United States v. Clark, 475 F.2d 240, 250-51 (2d Cir. 1973) (criticizing extemporaneous charge).

Should there by any doubt as to the reasonableness of counsel's repeated efforts to secure a proper charge in this case or as to how petitioner was grievously prejudiced by the charge given, it is respectfully submitted that such doubt can be resolved by examination of the record of the charge

conferences (JA 16-65) and the instructions which were given (JA 66-69, 71-72, 74-101, 106-08, 110-15). That record fully demonstrates the court's uninformed hostility toward petitioner's claim, how counsel repeatedly sought to point out that there was no evidence that petitioner was peculiar by reason of her having been injured by Kortright's sexual harassment, and ultimately how unfair and prejudicial was the charge given.

2. AMTRAK'S LEGAL ARGUMENTS

Amtrak's negligence argument (Br., 24-25) is patently superficial. Compare Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557, 568 (1987) (FELA liability can turn on "subtle and intricate distinctions"); see also Petition, 34-41). Further, its claim that this issue is controlled by New York law (Br., 24), is incorrect, see, e.g.,

Rogers, 352 U.S. at 507, n. 13, as is also its argument that the Rogers causation instruction should not apply to a Buell-type case, see Buell, 480 U.S. at 562, n. 8 (citing Rogers on issue of causation); see also Rogers, at 507 n. 14 (citing and quoting 45 U.S.C. §51).

In addition, Amtrak's attempt to portray petitioner as emotionally unstable (see infra), which is in fact both baseless and vicious, ignores that, even were this the case, she would still have been entitled to a workplace that was safe and to be protected against sexual harassment. See Petition, 35-36, 39-41. All this argument demonstrates is how necessary it is in such cases for trial courts to distinguish carefully between negligence and the fact that a particular victim may have suffered unusually

severe consequences as a result of the actor's negligence, which this charge plainly did not do.

3. THE ATTACK ON PETITIONER[1]

Amtrak states that the medical evidence "presented a picture of petitioner as a seriously troubled and emotionally fragile woman who was unable to cope with stress and who was susceptible to a severe emotional reaction to anything she might perceive as sexual harassment" (Br., 12). In support of this assertion, it cites Dr. Howell's testimony concerning prior instances of stress and depression

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[1]Although Amtrak's personal attack on petitioner is in fact irrelevant to the issues of whether Amtrak was negligent and whether petitioner's condition was contributed to by that negligence, because Amtrak has focused on petitioner's prior mental and emotional condition as its first line of defense in opposing this petition, we believe that it is necessary that we address these contentions in some detail.

which "were significant and appeared to have contributed to the stress she perceived at her job in 1984" (Br., 12, citing Howell, 29, 126).

It also cites Howell's testimony concerning a 1981 episode of depression experienced by petitioner (Br., 13, citing to Howell, 109, 112-13, 32-33), as well as Dr. Orlosky's testimony concerning possible preexisting susceptibility to panic attacks (Orlosky, 101), which Amtrak describes as a "preexisting mental condition" (Br., 13), and that of psychologist Belt, which, by selective quotation, Amtrak portrays as establishing "a history of vulnerability, coping with stress" (id., 14, citing to Belt, 73), and "limited...coping skills," and, again, even "a mental condition" (Br., 14, quoting from Belt at 138).

In fact Dr. Howell pointed out that petitioner had endured other

quite stressful situations which had not caused panic attacks (Howell, 55-57, 74-77). These included divorce, medical illnesses and the death of her father in 1981, after which she did suffer a period of depression for which she was treated in 1981, and in connection with which she did have an adverse reaction requiring hospitalization when she was taken off an antidepressant. (id., 29, 55, 57-58, 112-13).

However, Howell did not testify that the prior stress or depression in any way caused the injury she suffered as a result of the prolonged workplace sexual harassment to which she was subjected, which, in any event, would not establish that she was previously "a seriously troubled and emotionally fragile woman...unable to cope with stress [or] susceptible to a severe emotional reaction to anything she might perceive as sexual harass-

ment" (Br., 12). And, as to Howell's statement that the earlier "significant stresses in [petitioner's] life... seemed to be contributing to the stress that she perceived in 1984" (Howell, 29), as he explained, such prior stresses affect how the patient "perceives" new stress (id., 29-30). In his testimony at that point the doctor was referring to the patient's "perception," not to causation or predisposition.

Similarly misleading is Amtrak's reference to Dr. Orlosky's testimony that "some of the medication petitioner was taking could cause generalized anxiety or recurrent panic attacks" (Br., 14, citing Orlosky, 62-63, 67). In fact, at pages 62-63 Orlosky was testifying about medication petitioner was taking for her present condition when he saw her in July, 1987 (Orlosky, 59-64). And, as to page 67,

there all the doctor indicated was that petitioner had in the past suffered from hyperthyroidism and that excessive doses of medication for that condition--of which there was absolutely no evidence--could produce panic attacks or generalized anxiety (Orlosky, 66-67).

Likewise dishonest is Amtrak's attempt to suggest through Belt's testimony that petitioner had had a prior history of extreme vulnerability and inability to cope with stress and even a prior "mental condition" (Br., 14, citing to Belt, 73 and 138). In fact, while Belt did testify that petitioner had a history of "some stresses [centering] around physical problems" (Belt, 28), which would have a tendency to make one more vulnerable to panic attacks (id.), he was firm that she had not had "emotional problems" (see Belt, 28). And, as to

his reference (at page 138) to "coping skills [being] very limited" and even to "a mental condition" (see Br., 14), it is sufficient to note that in this part of his testimony Belt was referring to petitioner's condition when he was treating her in February, 1985, which was months after she had left Amtrak (see Belt, 137-38). More pertinent to this issue is Belt's testimony describing how, starting in June, 1984, he began treating petitioner for the stress she was suffering as a result of Kortright's harassment (Belt, 6, 8-9, 11), which harassment caused her to be "very upset," with physical symptoms (id., 9), and with petitioner becoming "increasingly focused and preoccupied with this stressor" (id., 10). Compare American Psychiatric Association, "Statement on Discrimination Based on Gender or Sexual Orientation," Am. J.

of Psychiatry, November 1988, p. 1494, identifying sexual harassment as a potentially severe occupational stressor.

The Claim of Malingering

At page 13 of its brief Amtrak notes that, "[a]lthough petitioner visited Dr. Howell's group four times in March and again on August 7, 1984, she did not mention or complain about any stress at her job [citing Howell, 119-21]. The first time petitioner complained about any such problem at work was on August 27th id. at 121), after she had filed her EEO [sic] complaint." Similarly, Amtrak has petitioner seeing Belt, presumably for the first time, "in October of 1984" (Br., 14). Also, Amtrak makes much of petitioner's pursuing a career in real estate after she left Amtrak (Br., 6-7).

However, Amtrak ignores Belt's testimony that he began treating petitioner for stress in June, 1984 (Belt, 6, 8-9, 11). It also ignores the testimony of petitioner's medical witnesses establishing that she was suffering from a seriously disabling illness and that the precipitating cause of this was the sexual harassment to which she had been subjected at her place of work (see Howell, 56; Orlosky, 26-27; Belt, 26-27, 85, 98-99, 119-20). Also, Amtrak ignores for how long petitioner attempted to continue working despite Kortright's persistent harassment and Amtrak's indifference to her plight. In addition, it ignores that petitioner's subsequent real estate employment was employment which Belt believed would be consistent with her need to avoid confinement and to come and go as she felt necessary (Belt, 20-21). Again, Amtrak's

appellate strategy is both obvious and, we believe, dishonest. There is no basis for Amtrak's suggestion that petitioner is a malingerer, and it is dishonorable for Amtrak to make this type of attack on her.

Ability to Hold a Job

Likewise dishonest is Amtrak's attempt to portray petitioner as incapable of holding a job for more than a very short period (Br., 5-6). There was nothing extraordinary about petitioner's early in her work career having changed jobs in order to better herself (see T35-36, left first two jobs for more money). Nor was it evidence of instability that in 1975 she had to leave her then job to be hospitalized for cancer surgery, following which, after four weeks, she returned to that same job (T36-37), or that later in 1975 she joined Amtrak in order to obtain medical coverage, as

well as better pay, or that in May, 1976, she accepted a promotion which required her to move to the Philadelphia area, where she continued to work for Amtrak until August, 1980, over four years later, when she resigned because her then marriage was failing and her father was dying of cancer (T38-39, 41-43).

Moreover, it is significant that during her last period of Amtrak employment, which was from August, 1983 through September, 1984, during which she worked arduous hours while at the same time trying to raise a young son, she was promoted to a higher position, requiring her transfer to New York from Amtrak's Philadelphia offices (T50-53). And the voluntary "demotion" which Amtrak refers to (Br., 6) was, she explained, occasioned by the fact that she was commuting to New York from

Trenton and she was desirous of working more reasonable hours in order to have time with her son (T54-55).

In short, Amtrak's personal attack on petitioner is nothing more than an unwarranted cheap-shot which only brings dishonor on Amtrak and disserves this Court and the cause of justice.

4. AMTRAK'S "REASONABLE RESPONSES"

Amtrak asserts, citing to Mr. Sullivan's testimony concerning what instructions he had given Thompson and DePalo, that they "immediately instructed Kortright to stay away from petitioner" (Br., 9; see also id., 8). This is an outright misrepresentation of the evidence. Sullivan testified that he did not follow up on this matter (T 364). Thompson did not testify. And neither Kortright nor DePalo testified to Kortright's being

emphatically instructed to cease and desist bothering petitioner (see T512 [Kortright]; T 418-30 [DePalo]).

In this same vein, Amtrak ignores Thompson's failure to inform Sullivan of the sexual harassment complaint made against Kortright in February, 1984 (see T397, 401-02, 302-04). Also, Amtrak never explains why this jury, which accepted petitioner's testimony concerning Kortright's harassing her, was required to reject her testimony concerning her complaints to Summa.

Finally, although Amtrak claims to have acted "reasonably" in response to petitioner's "formal" complaint in August, 1984, it makes absolutely no attempt to defend its delay in responding to that complaint. And, in fact, there is no evidence of Amtrak's taking any steps to protect petitioner against Kortright's

continued harassment following the filing of her August complaint until by letter dated October 3, 1984, it notified Kortright that he was to "attend a formal investigation" (JA 128-29; T548). This did not comport with Amtrak's requirement of a "prompt and thorough investigation" (JA 121) or its requirements that supervisors and managers "maintain[] a positive and productive work environment" and that supervisors "take all steps possible to eliminate any harassment they become aware of" and "counsel subordinates as necessary" (id.).

## CONCLUSION

Amtrak's strategy in opposing this petition is both transparent and dishonorable. It is willing to misstate the law and to misrepresent the facts. It has adopted this strategy because it has no legitimate basis for opposing this petition.

Based upon the errors which occurred at this trial, this Court should grant the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JESSE C. SABLE
450 Seventh Avenue
New York, NY 10123
(212) 244-2740

L. KEVIN SHERIDAN
1045 Oyster Bay Road
P.O. Box 69
East Norwich, NY 11732
(516) 922-8030
Counsel of Record

Counsel for Petitioner

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